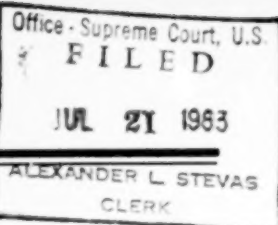


82-2148



No. 82-.....

In The
Supreme Court
of the United States

October Term, 1982

JANET WHISENHUNT and
STANLEY WHISENHUNT,

Petitioners,

vs.

LEE SPRADLIN, et al.,

Respondent.

*On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit*

BRIEF OF RESPONDENTS IN OPPOSITION

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*On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit*

BRIEF OF RESPONDENTS IN OPPOSITION

I.

OPINIONS BELOW

The opinion of the 5th Circuit is reported at 701 F. 2d 470 (5th Cir. 1983). The unreported Judgment of the trial court and that court's Findings of Fact and Conclusions of Law are shown in the Appendix, *infra*, at pages A-1 through A-12.

II. JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) to review an order of the Court of Appeals entered on March 28, 1983.

III. STATUTES AND GENERAL RULES AND REGULATIONS OF THE AMARILLO POLICE DEPARTMENT INVOLVED

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

General Rules, Rules and Regulations of the Amarillo Police Department:

"*Section 113, Part 8:* No member shall engage in any personal conduct or act which, if brought to the attention of the public, could result in justified unfavorable criticism of that member or the department. No member be [sic] involved personally, in disturbances or police incidents to his discredit.

"*Section 123:* Any member or employee of this department whose duties and responsibilities are not otherwise specifically prescribed in these rules and regulations shall be faithful in attendance to,

diligent and competent in the performance of such duties as are indicated by the title by which he is assigned."

IV.

QUESTIONS PRESENTED FOR REVIEW

1. May a chief of police impose sanctions on police officers for violating valid rules of the police department?

2. Did Petitioners have a property or liberty interest that was protected by the United States Constitution?

3. Have the Petitioners, who were given notice in writing stating the reasons that sanctions were being imposed; who were afforded a four-day hearing before the Amarillo Civil Service Commission, throughout which they were represented by attorneys of their choice; who were afforded a full, de novo trial before a United States District Judge; and who were granted oral argument before the 5th Circuit Court of Appeals, been afforded due process?

V.

STATEMENT OF THE CASE

Petitioners do not fully state the nature of the case in their brief, and therefore we make this statement:

One of the side effects of young ladies becoming police-women was that policemen with years of experience and rank, in this case a sergeant, and the female recruits, commenced pairing off, two-by-two, in a manner not grossly unlike what happened to those who occupied Noah's Ark, save and except that here only Homo sapiens were involved, and they all worked for the Ama-

Amarillo Police Department. This obviously caused problems affecting the efficiency of the police department (A-5), among which were these:

1. Reports had come to the chief from various sources and by rumor that three couples had paired off and were living together (A-2).

2. Wives of police officers were calling the chief complaining about the situation.

4. Dirty messages about the situation were being written on the walls of a restroom.

5. The chief had personally chastised one officer for this type of conduct.

6. The chief, through channels, had warned Whisenhunt, but the warning had been ignored.

7. A lieutenant filed a formal complaint with the chief complaining about an officer in his section engaged in this type of conduct.

The chief had to take action. At an earlier time, before the investigation which brought about the sanctions involved in this case, Chief Spradlin had ordered that an investigation be made. When it became known that such an investigation was underway, the activity either quieted down or those involved became more discreet. At any rate, the investigation ended. After that investigation ended, the activity again became active. At length, Captain Hill went to the chief and outlined the problems and suggested that something should be done. Chief Spradlin appointed a committee, headed by the chief of the detective division of the Amarillo Police Department, to find out what the facts were and report to him

(A-3). The committee investigated the four couples with respect to whom strong rumors of cohabitation were circulating. One of those couples was Sgt. Whisenhunt and Policewoman Shawgo. The investigating committee found as a fact and reported to the chief that Sgt. Whisenhunt and Policewoman Shawgo were cohabiting at an apartment on Virginia Street in Amarillo (A-3-4). Based upon that finding, the chief imposed sanctions, that is, each was given twelve days off duty without pay, and Sgt. Whisenhunt was demoted. Neither was fired. Later, each of them voluntarily submitted a resignation in writing (A-6).

The foregoing does not state all of the facts, but it is complete enough to give an accurate picture of what happened.

VI.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. **Chief Spradlin, Whose Responsibility It Was To See That The Police Department Functioned In An Efficient Manner, Had The Authority And Duty To Enforce Valid Rules Of The Amarillo Police Department.**

The trial court found:

A. Petitioners had knowledge of the relevant rules of the Amarillo Police Department (A-1-2).

B. Petitioners had knowledge of the police department rule which prohibited police officers from engaging in "conduct prejudicial to good order." (A-1-2).

C. The chief of police heard rumors from several

sources that Patrolwoman Shawgo and Sergeant Whisenhunt were living together (A-2).

D. The chief of police ordered an investigation to find out whether the rumors about Patrolwoman Shawgo and Sergeant Whisenhunt were true or untrue (A-2).

E. Based upon the report from the investigating committee, the chief of police served notice upon Patrolwoman Shawgo (A-3) and Sergeant Whisenhunt (A-3-4) that they had been cohabiting without being legally married, at 3807 Virginia Street, Apartment 20, Amarillo, Texas.

F. Petitioners requested and were granted a full and complete hearing before the Civil Service Commission of the City of Amarillo, a fair tribunal, which sustained the chief of police (A-5).

G. The ability of the Petitioners to perform their duties effectively was impaired by the publicity given the hearing which they requested (A-5).

H. Each of the Petitioners resigned (A-6).

2. The Rules Which The Trial Court Found That Petitioners Had Violated Were Not Unconstitutionally Vague

In *McDonald v. Miller*, 596 F.2d 686 (5th Cir. 1979), a fireman who was discharged filed suit contending that the regulation under which he was discharged was unconstitutionally vague. The regulation read:

"All Members shall:

"2. Refrain from committing any act which might bring discredit upon the Department or its members."

The district court's judgment was affirmed in a per curiam opinion from which we quote:

"The district court rejected McDonald's contention on the basis of the rule of *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L.Ed.2d 439 (1974) that 'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.'"

Additionally, rules in substantially the same language of the rule in question have withstood the attack of being unconstitutionally vague. *Davis v. Williams*, 617 F.2d 1100, 1104 (5th Cir. 1980), (conduct prejudicial to good order); *Harper v. Lindsay*, 616 F.2d 849, 857 (5th Cir. 1980), (to violate these regulations on the premises of the massage establishment); *Parker v. Levy*, 417 U.S. 733 (1974); *Fabio v. Civil Service Commission of the City of Philadelphia*, 414 A. 2d 82 (Pa. 1980).

The trial court found:

"10. The rules used for the disciplinary suspensions and demotion are not unconstitutionally vague or overbroad on their face."

"11. The rules in question were not unconstitutionally vague or overbroad as applied.

" An intimate relationship between an officer and subordinate is reasonably within the conduct proscribed by Section 113, Part 8, and Section 123 of the General Rules of the Rules and Regulations of the Amarillo Police Department, and Rule XIX, Section 108 of the Personnel Rules of the City of Amarillo."

The violation of these valid rules would have justified termination. *Allen v. Herrera*, 257 S.W. 2d 753 (no hist.); *City of Wichita Falls v. Harris*, 532 S.W. 2d 653 (RNRE); *Duckett v. Civil Service Commission of the City of Hous-*

ton, 598 S.W. 2d 640 (RNRE); *Vick v. City of Waco*, 614 S.W. 2d 861 (RNRE); *City of Austin v. Villegas*, 603 S.W. 2d 282 (RNRE).

The sanctions imposed by the chief of police were moderate indeed, taking into consideration that Sergeant Whisenhunt had been previously warned, but in any event, the court should not substitute its judgment for the judgment of the chief of police, whose responsibility it was to operate an efficient police department for the City of Amarillo. *Falgoust v. United States Marshals Service*, 539 F.Supp. 182 (USDC, Tex.).

3. Petitioners Had No Property Or Liberty Interest Protected By The Constitution That Was Violated, And, Furthermore, They Have Been Afforded Due Process.

In determining whether a Section 1983 cause of action has been alleged, the first question is whether the plaintiffs have been deprived of a right secured by the constitution.

Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433, at 439:

"The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right, 'secured by the Constitution and laws.' If there has been no such deprivation, the state of mind of the defendant is wholly immaterial."

In *Bradt v. Smith*, 634 F.2d 796 (5th Cir., Tex.), at 799, the court held:

"In order to state a claim upon which relief can be granted under § 1983, the complaint must show the deprivation of a right that is secured by the Constitution and laws of the United States. *Martinez v.*

California, 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980); *Baker v. McCollan*, 443 U.S. 137, 139, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)."

PETITIONERS HAD NO PROPERTY INTEREST

An alleged property interest based upon a claim for continued employment must be based on a source independent of the Fourteenth Amendment to the United States Constitution.

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684, at 690:

"A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law."

In *McMillan v. City of Hazlehurst*, 620 F.2d 484, the 5th Circuit, applying Mississippi law, affirmed a judgment of dismissal in a suit filed by a former city police officer who claimed a property interest in his continued employment and that his summary termination violated due process. On page 485 the court says:

"In an action such as this, a protected property interest must be based upon a legitimate claim to continued employment under a source independent of the fourteenth amendment. *McDonald v. Mims*, 577 F.2d 951 (5th Cir. 1978). Such a source may be state law or a mutually explicit understanding between employer and employee. *Hennessey v. National Collegiate Athletic Association*, 564 F.2d 1136 (5th Cir. 1977)."

The Texas Civil Service Statute does not grant Sergeant Whisenhunt a right to remain a sergeant.

In *City of Amarillo v. Hancock*, 239 S.W. 2d 788 (Tex.

1951), Captain Hancock, upon the recommendation of the chief of the fire department, was demoted to driver. The trial court rendered judgment in favor of the plaintiff and this was affirmed by the Amarillo Court of Civil Appeals. The Supreme Court reversed and ordered that the case be dismissed for want of jurisdiction. We quote from page 791:

"So, in order to sustain the jurisdiction of the district court here, plaintiff must bring himself within the protection of the due process clause. To do that, the right affected adversely here by the action of this administrative body must be vested property right. Thus we are brought to the question:

"Does plaintiff have a vested property right in his captaincy in the Amarillo Fire Department?

"The answer is 'No.'"

And again from page 792:

"Since we have determined that the district court had no jurisdiction it becomes unnecessary for us to consider whether he was unjustly demoted. Accordingly, the judgments of the district court and the Court of Civil Appeals are reversed and it is ordered that the case be dismissed for want of jurisdiction."

See, also, *Pope v. City of Dallas*, 636 S.W. 2d 244 (no hist.).

Neither Petitioner has a right to appeal the twelve-day suspension without pay.

In *Firemen's and Policemen's Civil Service Commission v. Blanchard*, 582 S.W. 2d 778, 779 (Tex. 1979), the court held that there was no appeal from an order of the chief suspending two officers where the period of suspension was less than fifteen days.

LIBERTY INTEREST

Petitioners have no Fourteenth Amendment cause of action upon the basis that their "liberty" interest has been violated.

In *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420, the plaintiff, a prisoner, who ordered hobby materials which came to the Nebraska prison where they were lost, sued the warden and other state employees in positions of considerable authority under Sec. 1983. The trial court sustained plaintiff's motion for summary judgment and this was affirmed by the circuit. The Supreme Court reversed, and in so doing based its holding upon principles heretofore briefed and urged in this case which include:

The Fourteenth Amendment does not protect against all deprivations against life, liberty, or property by the state but only against deprivations "without due process of law."

On page 430 the court says:

"Nothing in that amendment protects against all deprivations of life, liberty or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'"

It is denied that Petitioners' reputations were damaged or that their rights of privacy were violated, but even if they had been, those rights are not protected by the constitution.

Paul v. Davis, 424 U. S. 693, 96 S. Ct. 1155, 47 L.Ed.2d 405, at 420:

" * * * petitioners' defamatory publications, however seriously they may have harmed respondent's

reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."

And on pages 420 and 421 the court held that the plaintiff had no cause of action for "right of privacy."

In *Cook v. Houston Post*, 616 F.2d 791 (5th Cir., Tex.), a reporter for the newspaper, named Williams, wrote a series of stories about the alleged corruption in the Houston Fire Department with the result that Cook and others were indicted but subsequently acquitted. Cook then filed a lawsuit against the district attorney and the Houston Post. The suit was dismissed and this judgment of dismissal was affirmed by the 5th Circuit. The court held that the prosecutor had absolute immunity.

With respect to the portion of the case in which we are interested the court held that even though plaintiff had voluntarily resigned because of the bad publicity, he had no cause of action in federal court because reputation alone is not protected by the due process clause. We quote from page 794:

"The Fourteenth Amendment does not protect against all deprivations of liberty or property. It protects only against deprivations of liberty accomplished without due process of law. The Due Process Clause does not *ex proprio vigore* extend to a person a right to be free of injury merely because the state is characterized as the tortfeasor. The Constitution does not guarantee that only the guilty will be indicted and arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted — indeed for every suspect arrested. *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L.Ed.2d 433 (1979). Plaintiffs were indicted by a grand jury and acquitted by a petit jury.

"Appellants' interest with reputation, false arrest, malicious prosecution, libel and slander are matters which the State protects by virtue of its tort law, providing a forum for those interests by means of damage actions."

Even assuming, but not agreeing, that Petitioners' "liberty" was violated, due process requires only that an individual whose good name, reputation, honor, or integrity has been impaired by governmental action be provided with an opportunity for a hearing to clear his name. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548.

PRE-SANCTION HEARING NOT REQUIRED

Laje v. R. E. Thomason General Hospital, 564 F.2d 1159 (5th Cir. Tex.), at 1162. The hearing does not have to be before sanctions. *Davis v. Vandiver*, 494 F.2d 830 (5th Cir., Tex.), at 833. *Blair v. Robstown Independent School District*, 556 F.2d 1331 (5th Cir., Tex.), at 1334; *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L.Ed.2d 420.

CONCLUSION

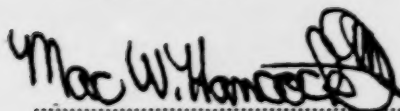
This is not a case of constitutional dimensions. What happened is that two police officers violated published rules of the police department with which they were familiar. Sanctions were imposed. No property or liberty interest protected by the constitution is involved. They were granted a full and fair hearing before the civil service commission, and they lost there. Neither of them was entitled to an appeal from the suspension without pay sanction because it was for a period of less than 15 days. The trial court could and should have determined

the question of Sergeant Whisenhunt's demotion by examining the report of the hearing before the civil service commission and determining whether the findings of that commission were supported by substantial evidence. Instead the Honorable Trial Court gave both parties a full trial, de novo, and they lost there. They appealed to the 5th Circuit which granted oral argument, and they lost there. The Supreme Court of the United States was not given jurisdiction for the purpose of affording the losing party a third trial. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Mac W. Hancock III
Attorneys for Respondents

July 20, 1983.

CERTIFICATE OF SERVICE

I, MAC W. HANCOCK III, declare and state:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 500 First National Bank Building, Amarillo, Texas, 79101. On July 20, 1983, I served the within Brief of Respondents on all parties involved in said action by directing Southwestern Law Press to place three copies thereof, with postage thereon fully prepaid, in the United States Mail at Dallas, Texas, addressed as follows:

Mr. James C. Harrington
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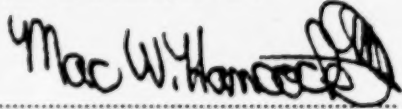
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United States Court of Appeals
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Office of the Clerk
600 Camp Street
New Orleans, Louisiana 70130

I declare, under penalty of perjury, that the foregoing
is true and correct.

Executed July 20, 1983, at Amarillo, Texas.

A handwritten signature in black ink, appearing to read "Mac W. Hancock III". The signature is written in a cursive, somewhat stylized font. The "Mac" is written with a large "M" and a small "ac". The "W." is written with a large "W" and a small "W.". The "Hancock" is written with a large "H" and a small "H". The "III" is written with three vertical lines. The signature is written over a dotted line.

Mac W. Hancock III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED FEB. 11, 1982

Civil Action
No. CA-2-78-90

Janet Shawgo and Stanley Whisenhunt,
Plaintiffs,
v.

Lee Spradlin, Chief of Police,
City of Amarillo, Texas, ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSION OF LAW

This action came on for trial by the Court without a jury in the United States District Court for the Northern District of Texas, Amarillo Division. After considering the evidence, pleadings and arguments of counsel, the Court does hereby make its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. At the time of their suspensions, Plaintiff Janet Shawgo was a patrolman with the Amarillo Police Department and Plaintiff Stanley Whisenhunt was a sergeant with the Amarillo Police Department. Both were non-probationary employees.

2. During their employment with the Amarillo Police Department, Plaintiffs had knowledge of the following

General Rules of the Rules and Regulations of the Amarillo Police Department:

- (1) Section 113, Part 8: "No member shall engage in any personal conduct or act which, if brought to the attention of the public, could result in justified unfavorable criticism of that member or the department. No member be (sic) involved personally in disturbances or police incidents to his discredit."
- (2) Section 123: "Any member or employee of this department whose duties and responsibilities are not otherwise specifically prescribed in these rules and regulations shall be faithful in attendance to, diligent and competent in the performance of such duties as are indicated by the title by which he is assigned."

3. Also, during their employment with the Amarillo Police Department, Plaintiffs had knowledge of Rule XIX, Section 108, of the Personnel Rules of the City of Amarillo, which are the Civil Service Rules adopted by the Civil Service Commission of the City of Amarillo pursuant to Tex. Rev. Civ. Stat. Ann. Art. 1269m, Section 5. Such Rule proscribed "conduct prejudicial to good order."

4. Defendant, Amarillo Chief of Police, Lee Spradlin, heard rumors from several sources in the fall of 1977 that Patrolman Janet Shawgo and Sergeant Stanley Whisenhunt were living together.

5. On or about November 28, 1977, Chief Spradlin ordered an investigation to discover whether the rumors about Patrolman Shawgo and Sergeant Whisenhunt were true or untrue.

6. The detailed report of the investigation was delivered to Chief Spradlin on or about December 19, 1977.

The report showed the times and dates of Plaintiffs' entrances into and exits from Stanley Whisenhunt's apartment from December 1 to December 17, 1977. It showed that Janet Shawgo spent substantial time in Stanley Whisenhunt's apartment and that they spent the night together on a number of occasions.

7. Chief Spradlin recommended discipline against Janet Shawgo and Stanley Whisenhunt based on the investigation report.

8. Janet Shawgo was suspended without pay from the Amarillo Police Department for a twelve-day period from December 22, 1977, to January 3, 1978, on the grounds that she violated the General Rules of the Rules and Regulations of the Amarillo Police Department, Section 113, Part 8.

9. Janet Shawgo was given notice of the reason for her suspension as follows:

"During the past thirty (30) days, you have been cohabiting with Sgt. Stanley T. Whisenhunt of the Amarillo Police Department without being legally married to him, at 3807 Virginia, Apartment 20, Amarillo Texas."

10. Stanley Whisenhunt was suspended without pay from the Amarillo Police Department for a twelve-day period from December 20, 1977, to January 1, 1978, on the grounds that he violated the General Rules of the Rules and Regulations of the Amarillo Police Department, Section 113, Part 8, and Section 123, and the Personnel Rules of the City of Amarillo, Rule XIX, Section 108. Chief Spradlin recommended that Stanely Whisenhunt be demoted from the rank of Sergeant to the rank of Patrolman.

11. Stanley Whisenhunt was given notice of the reasons for the proposed suspension as follows:

"2. For violation of Section 113, Part 8, General Rules, of the Rules and Regulations of the Amarillo Police Department:

" From November 20, 1977, through December 19, 1977, you have been cohabiting with Officer Janet Shawgo of the Amarillo Police Department without being legally married to her, at 3807 Virginia, Apt. 20, Amarillo, Texas."

"b. For violation of Section 123, General Rules, of the Rules and Regulations of the Amarillo Police Department:

" Specifically, you have violated the principles of sound management and supervision of subordinates by establishing a relationship with two subordinates which would likely make you hesitate to take full disciplinary action against such subordinates should you be required to do so by the Rules and Regulations of the Amarillo Police Department."

" For the past thirty (30) days you have been cohabiting with Officer Janet Shawgo of the Amarillo Police Department as more fully set out in Paragraph A above, which is incorporated herein by reference. Officer Shawgo is subordinated to you in rank. Furthermore, for at least the past thirty (30) days you have been sharing your apartment with Officer John D. Edwards of the Amarillo Police Department, who is also subordinate to you in rank, for the purpose of defraying rent and expenses. You are, therefore, relying on Officer Edwards for financial assistance in the sense of sharing apartment expenses, and you have also given Officer Edwards an opportunity to become acquainted with your personal habits and activities."

"c. For violation of Rule XIX, Section 108, of the

Personnel Rules of the City of Amarillo:

- " For at least the past thirty (30) days, you have been cohabiting with Officer Janet Shawgo of the Amarillo Police Department without being legally married to her and have been sharing an apartment and apartment expenses with Officer John D. Edwards of the Amarillo Police Department, as more fully set out in Paragraph I above, the charges and allegations of which are incorporated herein for all purposes."

12. Janet Shawgo and Stanley Whisenhunt requested and were granted a hearing before the Civil Service Commission of the City of Amarillo.

13. The Plaintiffs were given a full and complete hearing before a fair tribunal. The Civil Service Commission of the City of Amarillo found that the disciplinary orders and the recommendations of Chief Spradlin should be sustained. Following the hearing, Stanley Whisenhunt was demoted.

14. Each Defendant acted pursuant to a good faith belief based upon reasonable grounds that they were acting in accordance with and in compliance with all laws, both state and federal.

15. Stanley Whisenhunt did not appeal his demotion to the District Court of the State of Texas.

16. Stanley Whisenhunt's and Janet Shawgo's ability to perform effectively was impaired by the publicity given the hearing requested by them. Janet Shawgo encountered hostility from the public in the course of her duties as a patrolman.

17. After his demotion, Stanley Whisenhunt was assigned duties which did not require contact with the

men he had previously supervised.

18. Stanley Whisenhunt, in writing, resigned, effective February 1, 1978.

19. Janet Shawgo, in writing, resigned, effective March 8, 1978.

20. Plaintiffs were not constructively discharged.

21. Stanley Whisenhunt was not disciplined or discharged because of his criticism of the Amarillo Police Department.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

2. The Defendants have the burden of pleading "good faith" as an affirmative defense. *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). They have met the requirements of *Gomez* by pleading immunity and by asserting a good faith defense for all defendants in the Pre-Trial Order signed by all parties and approved by the Court. Defendants are entitled to a qualified good faith immunity from liability in their individual capacities. *Familias Unidas v. Briscoe*, 619 F. 2d 391 (5th Cir. 1980).

3. A local governmental entity sued under 42 U.S.C. § 1983 may not assert a good faith defense. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). Good faith is not a defense to a suit against a party in his official capacity because such suits are actions against the governmental entity of which the official is an agent. *Familias Unidas*, supra;

Universal Amusement Co., Inc. v. Hofheinz, 646 F. 2d 996 (5th Cir, 1981). The City of Amarillo is liable for wrongful actions by Defendants in their official capacity. See, *Van Ooteghem v. Gray*, 628 F. 2d 488 (5th Cir. 1980).

4. A property right in employment is protected by the Fourteenth Amendment due process requirements. Whether a property right exists is determined by State law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The relevant state statute is Tex. Rev. Civ. Stat. Ann., Art. 1269m, as it was in effect at the time in question. The statute has since been amended.

5. The Firemen's and Policemen's Civil Service Act did not authorize an appeal to the Courts from disciplinary suspensions which did not exceed fifteen (15) days duration. *Firemen's and Policemen's Civil Service Commission of the City of Fort Worth v. Blanchard*, 582 S. W. 2d 778 (Tex. 1979). The orders of disciplinary suspension were final, subject only to constitutional challenges. *City of Amarillo v. Hancock*, 239 S. W. 2d 788 (Tex. 1951).

6. The Firemen's and Policemen's Civil Service Law, Tex. Rev. Civ. Stat. Ann. Art. 1269m, Section 20, permitted disciplinary suspensions of police officers by the head of the police department for reasonable periods, not to exceed fifteen days. The Statute provided that following notice by the department head to the Civil Service Commission within one hundred twenty (120) hours, the Civil Service Commission shall have the "power to investigate and to determine whether just cause exists

therefor," and may reverse the order of the department head.

The Court concludes that the temporary suspensions of the Plaintiffs for less than fifteen (15) days did not constitute deprivation of a *property interest protected by the Fourteenth Amendment to the United States Constitution*. *Fox v. Carr*, 552 S. W. 2d 885 (Tex. Civ. App. — Texarkana 1977, no writ history).

7. The Firemen's and Policemen's Civil Service Act, Tex. Rev. Civ. Stat. Ann. Art. 1269m, Section 18, authorized an appeal to State District Court from an order of demotion rendered by the Civil Service Commission. Plaintiff Stanley Whisenhunt failed to appeal the order of demotion to District Court. He cannot now challenge the merits of the Civil Service Commission order in Federal Court. This Court has jurisdiction only to consider the constitutional challenges to the demotion order.

8. The Firemen's and Policemen's Civil Service Law, Tex. Rev. Civ. Stat. Ann. Art. 1969m, Section 19, permitted demotions of a police officer by the head of the Police Department following a full and complete hearing before the Civil Service Commission. Art. 1269m, Section 19 provided in part:

"If . . . said Commission feels that probably (sic) cause exists for said demotion, they shall give such employee ten (10) days advance written notice to appear before them at a time and place specified in said written notice to the employee, and said employee shall have the right to a full and complete public hearing upon such proposed demotion. The Commission shall not demote any employee without such hearing."

The Texas Supreme Court in *The City of Amarillo v.*

Hancock, supra, held that a demotion under Art. 1269m, Section 19, is not a deprivation of a property interest protected by the due process requirements of the Fourteenth Amendment. This Court will nevertheless consider whether Stanley Whisenhunt was granted due process in his demotion.

9. Where an employee has a property right in employment, the due process clause of the Fourteenth Amendment requires written notice of the reasons for termination of employment prior to actual termination so that the employee is given an effective opportunity to rebut those reasons at a fair and impartial hearing. *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Thurston v. Decle*, 531 F. 2d 1264 (5th Cir. 1976). The Court concludes that the requirements of Art. 1269m, Section 19, were met, and that the hearing requirements of the due process clause of the Fourteenth Amendment were met with regard to the demotion of Stanley Whisenhunt.

10. The rules used for the disciplinary suspensions and demotion are not unconstitutionally vague or overbroad on their face.

The void for vagueness doctrine incorporates the due process notions of fair notice or warning. *Papachristou v. Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). A void for vagueness challenge involves consideration of both the essential fairness of the law and the impracticability of drafting the legislation with specificity. *Colton v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). When it is not feas-

ible for lawmakers to spell out in detail all prohibited conduct, a "catch-all" clause is appropriate, and not impermissibly vague or overbroad on its face. As a result, lawmakers need not choose between a detailed code or no code at all. *Arnett, supra*. The Court concludes that Section 113, Part 8 and Section 123 of the General Rules of the Rules and Regulations of the Amarillo Police Department and Rule XIX, Section 108 of the Personnel Rules of the City of Amarillo are not unconstitutionally vague or overbroad on their face.

11. The rules in question were not unconstitutionally vague or overbroad as applied.

An intimate relationship between an officer and subordinate is reasonably within the conduct proscribed by Section 113, Part 8, and Section 123 of the General Rules of the Rules and Regulations of the Amarillo Police Department, and Rule XIX, Section 108 of the Personnel Rules of the City of Amarillo.

12. Neither Chief Spradlin nor any of the members of the Civil Service Commission maliciously intended to injure Janet Shawgo or Stanley Whisenhunt. Further, Chief Spradlin's actions were not retaliatory measures made in an attempt to silence Plaintiffs' criticisms by disciplining Plaintiffs. The Court therefore finds that Plaintiffs' First Amendment rights to freedom of speech were not violated.

13. The right to privacy is not unqualified. A government regulation may limit this right for a "compelling state interest." *Roe v. Wade*, 410 U.S. 113, 154, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). A state has more interest in regulating the activities of its employees than the activi-

ties of the population at large. *Kelly v. Johnson*, 425 U.S. 238, 245, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976). Because of the compelling state interest in maintaining good order within the police department, the Court concludes that Plaintiffs' constitutional right to privacy has not been violated.

14. Any finding of fact that constitutes a conclusion of law shall be deemed a conclusion of law and any conclusion of law which constitutes a finding of fact shall be deemed a finding of fact.

15. Judgment should be entered that Plaintiffs take nothing and that the cause be dismissed on its merits.

ENTERED this 11th day of February, 1982.

/s/

MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FILED FEB. 11, 1982

Civil Action
No. CA-2-78-90

Janet Shawgo and Stanley Whisenhunt,
Plaintiffs,

v.

Lee Spradlin, Chief of Police,
City of Amarillo, Texas, ET AL.,
Defendants.

JUDGMENT

This action came on for trial before the Court and the issues having been duly tried and a decision having been rendered, it is

ORDERED AND ADJUDGED that Plaintiffs, Janet Shawgo and Stanley Whisenhunt, take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs their costs of action.

ENTERED this 11th day of February, 1982.

/s/

MARY LOU ROBINSON
United States District Judge